IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

C.R.A. NO. 232 OF 2000

Shri Busappa Aminappa Hunkunti ..... Petitioner
VS.
Shri Subrao Sakhu Patil & ors. ... Respondents

Mr. G.H. Keluskar for petitioner

CORAM: D. G. KARNIK **J.**

DATE: 25th September 2006

P.C.:

1. Heard learned counsel for the revision petitioner.

2. This revision application is directed against the judgment and order dated 4th October 1999 passed by the 4th Joint Civil Judge, Kolhapur allowing the respondents' diary application no. 55 of 1997 and thereby amending the decree.

3. The respondents filed a suit against the revision petitioner bearing Regular Civil Suit no. 29 of 1990 for a relief of

injunction restraining the petitioner from disturbing his possession of the suit land. Some mandatory injunction was prayed for but the exact relief claimed is not clear from the record. However, it appears that the mandatory order was passed. The first order passed in the suit is quoted below:

> "1. Suit is decreed with costs.
>
> 2. Defendant is permanently restrained from obstructing peaceful possession of the plaintiffs over suit site.
>
> 3. Decree be drawn accordingly."

4. Subsequently, the respondents made an application bearing diary application No. 55 of 1997 praying that the plaint be modified by adding a prayer to the effect that the shed constructed by the defendant (petitioner herein) should be demolished, the encroachment should be removed and the plaintiff (respondent herein) should be given vacant and actual possession of the suit property."

5. After hearing the parties the learned judge allowed the prayer and ordered modification of the decree and inclusion of the prayer directing that the encroachment be removed by admeasuring the structure as prayed in the diary application. That order of the learned Civil Judge dated 4th October 1999

is impugned in this revision application.

6. Diary application no. 55 of 1997 in which the impugned order was passed was purportedly made under section 152 of the Civil Procedure Code. Section 152 permits the court to make amendment in the orders or decrees to correct clerical or arithmetical mistakes in the judgment or order arising from any accidental slip or omission. Section 152 does not enable a court to modify the decree, except to correct the arithmetical or clerical errors. While passing the judgment in the suit the trial court had only granted a relief of injunction restraining the defendant from disturbing the possession of the plaintiffs. It had not grated any mandatory injunction directing the removal of the shed. The order omitting a direction to the petitioner to remove the shed cannot be said to be a clerical or accidental error in the judgment or order. The respondents had made a prayer in the suit for a mandatory injunction by way of an order directing removal of the shed by the petitioner and the said prayer was not granted by the trial court. It was open to the respondent to file an appeal for non granting of the relief of removal of the shed which amounted to refusal of that relief. The respondents therefore ought to have filed an appeal against the order which did not grant them the relief of removal of shed by the petitioner. It cannot be said that non- granting

of relief of removal of shed by the petitioner was by way of clerical or accidental omission. The trial court had no jurisdiction under section 152 CPC to modify the decree and grant relief which was not granted earlier.

7. In the circumstances the order passed by the trial judge is clearly erroneous and needs to be set aside. Accordingly the Revision application is allowed. The impugned order is set aside and the diary application 55 of 1997 filed by the respondents stands dismissed. In the facts and circumstances of the case parties shall bear their own costs.

(D.G. KARNIK J.)